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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

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JAMES OTHEL BORUFF,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

— — —

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

— — —

ROBERT W. RITCHIE
Counsel of Record
RITCHIE, FELS & DILLARD, P.C.
606 Main Avenue
Post Office Box 1126
Knoxville, TN 37901-1126
(615) 637-0661
Attorneys for Petitioner

QUESTION PRESENTED:

Whether, consistent with the rationale of *Simmons v. United States*, 390 U.S. 377 (1968), the government may call at trial a third-party witness originally called by the petitioner at a pretrial suppression hearing and whose identity was not previously known to the government; thereby forcing a defendant to choose between effectively asserting his Fourth Amendment right against unreasonable searches and seizures and his Fifth Amendment right against self-incrimination, his Fifth Amendment right to due process, his Sixth Amendment right to call witnesses, or his Sixth Amendment right to effective assistance of counsel?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner James Othel Boruff respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 21, 1989.

OPINIONS BELOW

The opinion of the court of appeals is reported at 870 F.2d 316 (5th Cir. 1989) and is reprinted in the appendix.

See App. 1a-10a. The opinion of the district court (App. 23a-24a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 21, 1989. A petition for rehearing was denied on June 8, 1989. See App. 11a-12a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution, Amendment 4
U.S. Constitution, Amendment 5
U.S. Constitution, Amendment 6

These provisions are set forth at App. 25a-26a.

STATEMENT OF THE CASE

On November 22, 1985, the petitioner, James Othel Boruff, was driving north on Highway 358 approximately thirty miles south of Marathon, Texas. Boruff, in a white Lincoln Town car, was driving approximately 300 yards in front of a silver Chevrolet pick-up truck, which contained approximately 590 pounds of marijuana. Boruff and the driver of the truck, Russell Boyd Taylor, were in constant communication via citizen band radios in an effort to avoid detection. The pickup truck, and eventually the car, were stopped by border patrol agents. An unlawful search of the truck resulted in the seizure of marijuana and the arrest of Boruff and Taylor.

On December 13, 1985, Boruff and Taylor were charged in a two count superseding indictment with possession with intent to distribute marijuana in violation of 21 U.S.C. § 841(a)(1) and conspiracy to possess with intent to distribute marijuana in violation of 21 U.S.C. § 846.

Boruff and Taylor each filed motions to suppress the evidence seized from the truck and the car. The trial court granted these motions on February 3, 1986. The United States appealed the suppression order to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the suppression order as to Taylor but reversed as to Boruff.[1] The Fifth Circuit concluded that,

> Boruff lacked standing to challenge the stop and search of Taylor's vehicle because the stop did not violate Boruff's own fourth amendment rights. Hence, the evidence obtained as a result of the stop of Taylor's vehicle [was] properly admissible against Boruff.[2]

In explaining their holding the Fifth Circuit said:

> Boruff provided no evidence to establish that the stop of Taylor's truck violated Boruff's

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[1] *See United States v. James Othel Boruff and Russell Boyd Taylor, No. 86-1175* (April 27, 1987), (copy attached at App. 13a-22a).

[2] App. 20a.

> fourth amendment rights. Taylor was the driver, sole occupant and registered owner of the pickup truck where the marijuana was found; Boruff had neither a proprietary nor a possessory interest in Taylor's truck.[3]

Following remand, the government dismissed the indictment against Taylor and proceeded with its case against Boruff. Boruff subsequently filed a motion with the district court requesting a hearing to establish his constitutional standing to contest the search of the truck driven by Taylor.

On August 5, 1987, the trial court held a hearing to resolve this question as to Boruff's standing. At this hearing Boruff testified to the following facts:

> (a) On July 9, 1985, Boruff contacted Mr. Kenneth Wayne Howell, a salesman for Jack Sherman Chevrolet in Midland, Texas. Boruff negotiated the purchase of a grey Chevrolet pick-up truck with Howell and Boruff paid for the truck with his own funds. This was the same truck seized by Border Patrol Agents on November 22, 1985.
>
> (b) The truck was registered in Taylor's name to avoid suspicion in case the truck was stopped or involved in an accident while Taylor was driving.

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[3] App. 20a-21a (emphasis added).

(c) Boruff planned to eventually sell the truck and he would keep the proceeds from any such sale.

(d) Within a day or two after he purchased the truck, Boruff drove it back to Knoxville, Tennessee.

(e) In Knoxville, on July 15, 1985, Boruff purchased a black camper top for the truck. The black top would not be available for several weeks so Boruff had a white camper top installed in the interim. Both purchases were made from the Copeland Corporation. Each invoice was made out in Taylor's name, but later, when the white top was re-sold the money was returned to Boruff.

(f) On July 16, 1985, Boruff purchased a combination grill and bumper guard from Knoxville Bumper Sales. The purchase was again made using Taylor's name.

(g) The grill and bumper guard along with fog lights, running lights, switches, and a CB radio were installed by Tim's Auto Repair in Knoxville, Tennessee.

(h) Boruff also purchased a tarpaulin and yellow nylon cord from Knox Farmer's Cooperative. This purchase was made in his own name. These items, which were found in the Chevrolet pickup truck, were also seized on November 22, 1985.

In support of his testimony, Boruff offered invoices, receipts, and cancelled checks documenting the above transactions. In a further attempt to corroborate this factually accurate, but inherently suspect testimony, Boruff called Kenneth Howell, Calvin Copeland, and Timothy Detienne as witnesses at the standing hearing. Prior to the standing hearing, the government was not aware that any of the witnesses called by Boruff existed or had any relevant testimony.

The trial court, on September 12, 1987, denied Boruff's motion to establish his standing to contest the search of the two vehicles. On November 9, 1987, the day Boruff's trial was to begin, the government announced its intention to call Mr. Howell, the corroborating witness presented by Boruff at the August 5, 1987 standing hearing. Defense counsel immediately objected on the grounds that Mr. Howell was called under the rationale of *Simmons v. United States*, 390 U.S. 377 (1968). Counsel argued that Howell was a witness developed by the defendant and was presented on behalf of the defendant at a hearing held exclusively to determine Boruff's standing to challenge an illegal search. The trial court ruled that the government would not be allowed to call Mr. Howell to testify at Boruff's trial. In one of two Orders on the *Simmons* question, filed by the District Court on April 21, 1988, the Court said:

> On November 10, 1988, Plaintiff requested a clarification on the issue of whether the United States would be allowed to call as witness Kenneth

> Wayne Howell who testified on August 5, 1987, in support of Plaintiff's efforts to establish standing. At that time, this Court allowed the testimony of Howell only for the limited purpose of the Motion to Suppress. *United States v. Simmons*, 390 U.S. 377 (1968). This Court expressly limited the purposes of the testimony and the United States will not be permitted to use the transcript of that hearing or call witness Kenneth Wayne Howell in the trial on the merits.

See App. at 23a.

The government again appealed to the Fifth Circuit, this time challenging the District Court's application of the *Simmons* doctrine. The Fifth Circuit reversed, holding that "Boruff's Fifth Amendment right against self-incrimination [was], [ ], not implicated when other individuals testified against him."[4] The Fifth Circuit acknowledged that "*Simmons* would, of course, bar the government from calling Howell at trial if it had learned of him solely from Boruff's testimony at the suppression hearing."[5] The Court of Appeals concluded, however, that merely because Boruff took the next step--not only testified about Howell but actually called him to the stand--the government would be allowed to call Howell at trial.

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[4] *United States v. Boruff*, 870 F.2d 316, 320 (5th Cir. 1989) (App. 8a).

[5] 870 F.2d at 319 (App. 5a-6a).

A petition to rehear was filed with the Fifth Circuit on May 5, 1989. This petition was denied on June 8, 1989.

On June 27-28, 1989, after unsuccessful petitions to stay the mandate in the Fifth Circuit and this Court, Boruff was tried. The government called Howell as their lead witness, and Boruff was convicted.

REASON FOR GRANTING THE WRIT

THE GOVERNMENT CANNOT, CONSISTENT WITH THE RATIONALE OF *SIMMONS V. UNITED STATES*, 390 U.S. 377 (1968), CALL AT TRIAL A THIRD-PARTY WITNESS ORIGINALLY CALLED BY THE PETITIONER AT A PRETRIAL SUPPRESSION HEARING AND WHOSE IDENTITY WAS NOT PREVIOUSLY KNOWN TO THE GOVERNMENT; THEREBY FORCING A DEFENDANT TO CHOOSE BETWEEN EFFECTIVELY ASSERTING HIS FOURTH AMENDMENT RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES AND HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION, HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS, HIS SIXTH AMENDMENT RIGHT TO CALL WITNESSES, OR HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

I. THE PATH OF THE LAW OF STANDING: *JONES* TO *SALVUCCI*.

In *Jones v. United States*, 362 U.S. 257 (1960), the defendant was charged with illegal possession of narcotics. The government challenged the defendant's standing to contest the search and seizure resulting in his arrest because he had not

alleged ownership of the contraband nor a valid property interest in the premises searched.[6] The *Jones* Court recognized that ordinarily it is proper to require one who seeks to challenge the legality of a search as the basis for suppressing evidence, to allege and establish that he was the victim of an invasion of privacy.[7] However, the Court noted that prosecutions for possession of unlawful contraband presented a "special problem" because narcotics charges alleging unlawful possession may be established solely through proof of possession. Thus, a defendant seeking to assert his Fourth Amendment rights is forced to allege facts which, if proved, would be sufficient to convict him.[8]

The *Jones* Court also reasoned that to allow the government to simultaneously assert that: (1) the defendant's failure to acknowledge an interest in the narcotics or the premises where they were found prevented the defendant's attack upon the search; and (2) the defendant criminally possessed the narcotics, permitted the government to maintain the advantage of contradictory positions as a basis for conviction, thus "subject[ing] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one

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[6] *Jones v. United States*, 362 U.S. 257, 259 (1960).

[7] 362 U.S. at 261.

[8] 362 U.S. at 261-62.

in that situation.[9] The Court found it not consistent "with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government."[10]

Accordingly, the Court held that when the defendant is charged with possession of unlawful contraband, and such possession both convicts and confers the standing, the defendant is relieved of any necessity for a preliminary showing of an interest in the premises searched or the property seized.[11] Thus, the so called *Jones'* "automatic" standing rule was grounded in the remedy necessary to address the "special problem" presented to a defendant who seeks to assert his Fourth Amendment rights while at the same time avoiding the incriminating nature of his own efforts.

It is that same recognition of the difficult dilemma in which a defendant finds himself when he seeks to establish his privacy interest in the very items that can incriminate him that lead this Court in *Simmons v. United States*, 390 U.S. 377 (1968), to hold that the defendant's testimony at a suppression hearing may not be used against him at trial on the issue of guilt. The *Simmons* Court recognized that the *Jones* decision only relieved the defendant of his burden to establish his

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[9] 362 U.S. at 263.

[10] *Id.*

[11] 362 U.S. at 263.

standing if charged with a possessory offense and thus in other prosecutions, a defendant's own testimony would be needed to establish standing. Therefore, the Court noted that the "only or at least the most natural, way in which [Mr. Garrett] could find standing to object to the admission of the suitcase [which incriminated him] was to testify that he was its owner."[12] Accordingly, the Court found Mr. Garrett's testimony to be "an integral part of his Fourth Amendment exclusion claim."[13]

The *Simmons* Court reasoned that it was obvious that a defendant who knows that his testimony at a suppression hearing may be admissible against him at trial will sometimes be deterred from presenting the proof of standing necessary to assert the Fourth Amendment claim.[14] Although the *Simmons* Court concluded that the defendant was not strictly "compelled" to testify against himself in support of a motion to suppress, he was compelled in the sense that if the defendant refrained from testifying in support of the motion to suppress, he would have to forego a benefit. The Court concluded that even though testimony is not always involuntary, as a matter of law, simply because it is given to obtain a benefit, when this assumption is applied to a situation in which the "benefit" gained is that afforded by another provision of the bill of rights, an undeniable tension is

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[12] *Simmons v. United States*, 390 U.S. 377, 391 (1968).

[13] 390 U.S. at 391.

[14] 390 U.S. at 392.

created. Thus, in *Simmons*, Mr. Garrett was obliged to either give up what he believed, with the advice of counsel, to be a valid Fourth Amendment claim, or, in legal effect, waive his Fifth Amendment privilege against self-incrimination.[15] The *Simmons* Court found it "intolerable" that one constitutional right should have to be surrendered in order to assert another.[16]

Finally, in *United States v. Salvucci*, 448 U.S. 83 (1980), this Court expressly overruled the "automatic" standing rule of *Jones v. United States*. The Court concluded that the underlying basis justifying the *Jones* decision no longer existed in light of several of its recent decisions.

The *Salvucci* Court found the dilemma identified in *Jones*, that one charged with a possessory offense may only establish his standing to contest a search and seizure by giving self-incriminating testimony, was remedied by *Simmons v. United States*.[17] The *Salvucci* Court reasoned that *Simmons* provided broad protection against the risk of self-incrimination in a defendant's effort to assert a Fourth Amendment exclusion claim. Now Chief Justice Rehnquist held that *Simmons*:

> [n]ot only extends protection against this risk of self-

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[15] 390 U.S. at 394.

[16] *Id.*

[17] *United States v. Salvucci*, 448 U.S. 83, 89 (1980).

> incrimination in all of the cases covered by *Jones*, but also grants a form of '*use immunity*' to those defendants charged with non-possessory crimes. In this respect, the protection of *Simmons* is therefore broader than that of *Jones*. (emphasis supplied).[18]

It is therefore clear that one charged with a possessory offense must now establish his legitimate expectation of privacy in the place or thing searched before he has standing to contest the search of that property or belonging. It is further clear in light of *Simmons* and *Salvucci* that the defendant's testimony in his effort to accomplish this task is immunized and that the government may not use this testimony in any manner against him in its case in chief. *Simmons v. United States*, 448 U.S. at 90, 94.[19]

With the decision in *Salvucci*, this Court has come full circle since the creation of the *Jones'* automatic standing rule. A defendant charged with a possessory offense, in order to assert his Fourth Amendment rights, now bears the heavy burden of establishing his "legitimate expectation

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[18] 448 U.S. at 90.

[19] The *Salvucci* decision did not decide the question of whether the use immunity that attaches to the defendant's testimony at a suppression hearing extends beyond the government's case in chief. *Salvucci*, 448 U.S. at 94.

of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 140 (1978).[20]

The instant case thus presents the natural consequence of this Court's decisions on the issue of constitutional standing. The Fifth Circuit held in *United States v. Boruff, et al.*, No. 86-1175 (April 27, 1987), that although the stop and subsequent search of the vehicle Taylor was driving was unlawful, that did not provide a basis for suppression of that evidence against Boruff because the stop did not violate Boruff's own Fourth Amendment rights.[21] Because the record before that court demonstrated that Taylor was the driver, sole occupant, and registered owner of the pick-up truck where the marijuana was found and that Boruff had neither a proprietary nor a possessory interest in Taylor's truck, the Fifth Circuit reversed the suppression order in Boruff's case.[22]

Therefore, with this background, Boruff and his counsel sought to establish the only link between Boruff and the truck, which could arguably demonstrate that he had the legitimate expectation of privacy in that truck necessary to contest its search.

This Court's rejection of the *Jones'* automatic standing rule and the Fifth Circuit's decision, applying those

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[20] *See also, Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980).

[21] App. 20a.

[22] App. 21a.

precedents, placed upon Boruff the burden of establishing his expectation of privacy.

Accordingly, he testified that he purchased the truck with his own funds and had paid to modify the truck, thus establishing an ownership interest in it. This story was factually accurate; however, it was inherently suspicious because it provided the one link which the Fifth Circuit had previously held was missing. It was also essential that Boruff provide corroborating proof to overcome the inherently suspicious nature of his own testimony. To accomplish this purpose, Boruff presented documentary evidence and called three witnesses to corroborate the detailed testimony he gave at the standing hearing.

The protection Boruff now seeks for that corroborating evidence is a natural progression of this Court's decisions addressing standing. As the law has evolved to place upon citizens the burden of establishing their privacy interests before they can legitimately claim a violation of the Fourth Amendment, it must also necessarily evolve to protect against use by the government of the necessary, but naturally self-incriminating tools they must utilize to meet that burden.

This case presents a question of first impression for this Court--now Chief Justice Rehnquist has stated that the full scope of the *Simmons* privilege has yet to be

decided.[23] For the following reasons, this Court should grant a writ of certiorari and insure that the law in this area does not develop in a manner imposing such unconstitutional costs upon the exercise of Fourth Amendment claims that citizens will be dissuaded from presenting valid claims.

II. TO PERMIT THE GOVERNMENT TO USE AGAINST BORUFF THE CORROBORATING WITNESS THAT BORUFF WAS REQUIRED TO REFER TO IN HIS OWN TESTIMONY AND TO CALL AT THE STANDING HEARING IMPERMISSIBLY FORCES BORUFF TO CHOOSE BETWEEN RELINQUISHING SEVERAL FUNDAMENTAL CONSTITUTIONAL RIGHTS AND ASSERTING HIS FOURTH AMENDMENT CLAIM FOR EXCLUSION.

A. Forfeiture of Defendant's Fifth Amendment Right Against Self-Incrimination.

Without question, the testimony of a defendant who testifies at a standing hearing is entitled to the use immunity established in *Simmons*. Generally, the *Simmons* holding is based on the rationale that a defendant should not be forced to forfeit one right guaranteed by the Bill of

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[23] In *United States v. Salvucci*, 448 U.S. 83, 94 (1980), Chief Justice Rehnquist, writing for the Court, notes that the breadth of the *Simmons* privilege is not decided in *Salvucci*. The Fifth Circuit in their opinion in this case, *United States v. Boruff*, 870 F.2d 316, 319 (1989), acknowledged that the proper breadth of the *Simmons* privilege was still an open question.

Rights in order to assert another, equally important, right also guaranteed by the Bill of Rights. *Simmons* specifically involved a defendant (Mr. Garrett) who was forced to sacrifice his Fifth Amendment right against self-incrimination in order to effectively assert his Fourth Amendment right to be free from unlawful searches and seizures. To counter this intolerable tension between two fundamental, constitutional rights, the Court held that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him on the issue of guilt."[24]

Simmons therefore created use immunity for defendants who choose to testify in support of their motion to suppress.

The scope of the *Simmons* use immunity should be at least equal to the use immunity that attaches to testimony compelled under a statutory grant of immunity. In *Kastigar v. United States*, 406 U.S. 441 (1972), this Court also addressed the necessity for protecting a defendant's right against self-incrimination in the context of a federal, statutory, grant of immunity. The Court discussed whether immunity from use and derivative use of the defendant's testimony is co-extensive with the scope of the constitutional privilege against self-incrimination. The precise question was whether, despite the lack of a grant of full transactional immunity, a person could be compelled to testify over a

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[24] *Simmons v. United States*, 390 U.S. 377, 394 (1968).

claim of the Fifth Amendment privilege against self-incrimination if they had been granted use and derivative use immunity from their testimony.

Accordingly, because *Kastigar* defines the scope of the Fifth Amendment privilege against self-incrimination as protecting the defendant against the use and derivative use of his testimony and because *Simmons* protects the defendant's right not to incriminate himself in the context of suppression hearings, then *Simmons* must also protect the defendant against the use or derivative use of his testimony at a suppression hearing.[25] It is rational to conclude therefore that *Simmons*, as does *Kastigar*, protects the defendant against any use of his testimony offered in support of a Fourth Amendment claim including evidence derived from it.

Kastigar made clear that in order to effectively protect the defendant's right against self-incrimination, after a person has testified under a statutory grant of immunity, the federal authorities have the burden of showing that their evidence is "not tainted by establishing that they had an independent, legitimate source for the disputed evidence."[26] *Kastigar* stated that where the defendant had testified under a grant of immunity, the "heavy burden" was

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[25] *See United States v. Salvucci*, 448 U.S. 83, 90 (1980) (*Simmons* provides the defendant "use immunity").

[26] *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (quoting *Murphy v. Waterfront Comm'm.*, 378 U.S. 52, 79 n. 18 (1964)).

shifted to the government to prove that "all of the evidence it proposes to use was derived from legitimate independent sources."[27]

In a *Kastigar* situation, testimony has been compelled under a threat of a contempt citation. The motivation to provide testimony in a *Simmons* situation is equally compelling. Under *Simmons*, Boruff's testimony was "compelled" in the sense that if he did not testify and explain his purchase of the truck from Mr. Howell, he would have to forego a benefit to which he was constitutionally entitled: his Fourth Amendment claim of exclusion.[28]

But, in *Simmons*, this Court recognized that a citizen need not be "compelled" in the strict sense of the word before use immunity could attach to their testimony. The Court recognized that a citizen's testimony at a suppression hearing might be deemed to be voluntary as an abstract matter, and that testimony to secure a benefit provided by the Constitution is not "*ipso facto* 'compelled'" within the meaning of the self-incrimination

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[27] 406 U.S. at 461-62.

[28] *See e.g., United States v. Rylander*, 460 U.S. 752, 758-59 (1983); *McGautha v. California*, 402 U.S. 183, 213 (1971); and *Williams v. Florida*, 399 U.S. 78, 83-84 (1970).

clause.[29] Thus, *Simmons* recognized that there can be compulsion within the meaning of the Self-Incrimination Clause where testimony is necessary to bear the burden of proof that one is entitled to constitutional protection.

The Fifth Circuit, in this case concluded that,

> *Simmons* would, of course, bar the government from calling Howell at trial if it had learned of him solely from Boruff's testimony at the suppression hearing.[30]

However, when the Court of Appeals applied the *Kastigar* requirement that Howell's testimony had to come from a "legitimate source wholly independent of the [defendant's] compelled testimony"[31] it found that merely because Howell testified, albeit solely as a result of Boruff's efforts and to corroborate Boruff's testimony, the government had met the heavy burden *Kastigar* imposes.

While the Fifth Circuit's conclusion may or may not correctly interpret the *Kastigar* requirements when applied in this situation, it clearly fails

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[29] *McGautha*, 402 U.S. at 212 (emphasis in original) (citing *Simmons*, 390 U.S. at 393-94).

[30] *United States v. Boruff*, 870 F.2d 316, 319 (1989) (App. 5a-6a).

[31] 870 F.2d 316, 320 (App. 9a) (quoting *Kastigar*, 406 U.S. at 46).

to satisfy the greater policy concerns of *Simmons*. The breadth of the *Simmons* privilege by necessity must be broader than that found in a *Kastigar* situation because a defendant in a suppression hearing has the burden to prove the merits of his constitutional claim. A citizen given a grant of immunity simply has no burden.

If *Simmons* is to be truly sufficient, bringing an end to the necessity of the *Jones'* automatic standing rule, as *Salvucci* reasoned, then the rule Boruff proposes must be applied. This rule is not radically broad--a picket fence must stand around the suppression hearing--a fence protecting the testimony a defendant elicits to satisfy his burden of establishing standing to contest a search from use against him on the issue of guilt unless and until the government satisfies its burden of demonstrating that the testimony it plans to offer was derived from legitimate sources wholly independent of the suppression hearing.

The testimony presented by Boruff at the standing hearing was "an integral part of his Fourth Amendment claim"[32] and because the protection *Simmons* affords was held to be absent, it also became an integral part of the government's proof at the trial on the merits. The direct result of this rule, as created by the Fifth Circuit, will be that defendants will not be able to fully present all relevant facts to courts adjudicating Fourth Amendment claims for exclusion of evidence. This result is

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[32] *Simmons v. United States*, 390 U.S. 377, 391 (1968).

neither constitutionally permissible nor judicially desireable.

B. Forfeiture of Defendant's Sixth Amendment Right to Call Witnesses in His Favor.

The underlying premise of *Simmons* is that a defendant should not be forced to forfeit one constitutional right in order to assert another. This case merely presents several variations on this theme.

The Fifth Circuit recognized the dangers of their holding but declined to grant relief because they erroneously assumed that the *Simmons* doctrine was exclusively rooted in the Fourth and Fifth Amendments. The Fifth Circuit stated that,

> While a defendant's decision to call third-parties to corroborate his testimony at a suppression hearing might be affected by his knowledge that the government may subsequently utilize that testimony at trial, 'this dilemma . . . does not use to the level of a constitutional problem.' [citing *Brown v. Trigg*, 791 F.2d 598, 602 (7th Cir. 1986); and *United States v. Ceccolini*, 435 U.S. 268, 277 (1978)]. Boruff was never forced to, nor did he, surrender his constitutional rights: he exercised his Fourth Amendment rights to challenge an allegedly unreasonable search and seizure, and the government did not seek to use his own testimony or any evidence developed as a

result of his own testimony to incriminate him at trial.[33]

The Fifth Circuit correctly notes that a defendant's decision to call third-party witnesses to corroborate his own inherently suspicious testimony at a suppression hearing will be controlled by the knowledge that the government may subsequently utilize that same testimony at trial. The Court's assertion that this dilemma does not rise to the level of a constitutional problem fails to recognize the important Fifth and Sixth Amendment rights implicated.[34]

The necessity of the protection which *Simmons* provides a defendant is not and should not be limited to only the requirement of foregoing one's personal Fifth Amendment privilege to assert what is believed to be a valid Fourth Amendment claim. The rationale of *Simmons* that it is impermissible to force someone to forego one's constitutional right for another has been applied to forced trade-offs between other constitutional rights. For example, the *Simmons* rationale has been applied to preclude the government from using at trial the defendant's testimony at a pretrial hearing to establish indigency for the

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[33] *United States v. Boruff*, 870 F.2d 316, 320 (1989) (App. 9a).

[34] This issue was raised in the Amicus Brief filed on behalf of the National Association of Criminal Defense Lawyers at page 8.

purposes of obtaining appointed counsel.[35] This Court has held in a number of decisions that it is impermissible to force someone to choose between self-incrimination and their means of livelihood.[36] The *Simmons* decision has also been applied to invalidate a statute which required a trade-off between First and Fifth Amendment rights.[37]

Thus, it is clear that *Simmons* protection is not limited to prohibiting

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[35] *See, United States v. Branker*, 418 F.2d 378 (2nd Cir. 1969); *United States v. Anderson*, 567 F.2d 839 (8th Cir. 1977); and *United States v. Ellsworth*, 547 F.2d 1096 (9th Cir.), *cert. denied* 431 U.S. 931 (1977). *The Branker* Court concluded that the *Simmons* rationale applied in this situation because:

> The constitutional right to counsel and to equal protection of the laws in prosecuting an appeal are no less important than the constitutional right to protection against illegal searches and coerced confessions.

418 F.2d at 381.

[36] *See, Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Spevack v. Klien*, 385 U.S. 511 (1967); and *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

[37] *See, Lefkowitz v. Cunningham*, 431 U.S. 801 (1977). *See also, Lefkowitz v. Turley*, 414 U.S. 70 (1973).

forced trade-offs between Fourth and Fifth Amendment rights.

Boruff was placed in a position where the cost of exercising his fundamental constitutional right to call witnesses at the standing hearing was to provide incriminating evidence which the government was permitted to use at his subsequent trial.

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284 (1973). "The right of an accused to have compulsory process for obtaining witnesses stands on no lesser footing than the other Sixth Amendment rights . . ." *Washington v. Texas*, 388 U.S. 14 (1967). As early as 1948, this Court in *In re Oliver*, 333 U.S. 257 (1948), recognized that the right of an accused to offer testimony was basic in our system of jurisprudence. Later, in *Washington v. Texas*, 388 U.S. 14, 19 (1967), the Court held that,

> Just as an accused has the right to confront the prosecution's witnesses for the purposes of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.[38]

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[38] In *Washington v. Texas*, 388 U.S. 14 (1967) and *Chambers v. Mississippi*, 410 U.S. 284 (1973), this Court found that the defendant's right to call witnesses was an essential element of due process and

In *Chambers*, this Court recognized that the accused's Sixth Amendment right to cross-examine witnesses against him was not absolute and might, in appropriate circumstances, bow to accommodate other legitimate interests in the criminal trial. But that its denial or significant diminution calls into question the ultimate "'integrity of the fact-finding process'" and requires that the competing interest be closely examined.[39] The denial or significant diminution of the Sixth Amendment right to call witnesses should receive the same exacting scrutiny by this Court.

Contrary to the Fifth Circuit's conclusion that Boruff's dilemma did not rise to constitutional proportions, it is clear that his right to due process of law and right to call witnesses were implicated. Boruff did not have a chance to decide whether to forfeit his Fourth, Fifth, or Sixth Amendment rights because he, along with the district court,[40] believed that the testimony of Mr. Howell would be protected under the *Simmons* doctrine. Boruff has however paid an extremely high price for exercising his Sixth Amendment right to call witnesses, in doing so he provided the

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applicable to the states via the Fourteenth Amendment.

[39] *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973) (citing *Berger v. California*, 393 U.S. 314, 315 (1969)).

[40] *See*, District Court's Order, Dated April 21, 1989. (App. 23a).

government with evidence they effectively used to convict him.

C. Forfeiture of Defendant's Sixth Amendment Right to Effective Assistance of Counsel.

The underlying rationale of *Simmons* that it is impermissible to force a criminal defendant to forego one right in exchange for pursuing another right is further illustrated by another choice Boruff had to make: exercise his Sixth Amendment right to effective assistance of counsel or forego his Fourth Amendment right to be free from unreasonable searches and seizures.

It is fundamental that the "right to counsel is the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 (1970)). If the government interferes with the ability of counsel to make independent decisions about how to conduct the defense of his client, then the right is violated.[41] Accordingly, the right to effective assistance of counsel includes: (1) the right to have a summation on behalf of the defendant at a bench trial[42]; (2) the right to choose the order of proof introduced[43]; and (3) the right to have counsel examine

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[41] *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

[42] *Herring v. New York*, 422 U.S. 853 (1975).

[43] *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972).

the defendant at his trial.[44] Each of these situations involves restrictions on the ability of the attorney to effectively represent his or her client which have been held to infringe upon that client's right to effective assistance of counsel.

In order to allow Boruff's counsel to fulfill his constitutional duty to effectively represent his client, this Court must allow counsel to call witnesses in support of a Fourth Amendment claim for exclusion that have been independently developed by defense counsel without the fear that these witnesses will be used against their client in the trial. Otherwise, Boruff's right to effective assistance of counsel is hollow. The price of foregoing a Fourth Amendment claim of exclusion should not be one's right to effective assistance of counsel.

This point is illustrated by the Fourth Circuit's decision in *Gibson v. Zahradnick*, 581 F.2d 75 (4th Cir.) *cert. denied*, 493 U.S. 996 (1978). At issue in *Gibson* was the testimony of a state-employed psychiatrist who evaluated the defendant for the purposes of determining his competency to stand trial. The psychiatrist testified over objection as to incriminating statements the defendant made to him during the course of their interview. The Fourth Circuit held that the defendant's statements were not voluntarily made and this could not be admitted to trial.

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[44] *Ferguson v. Georgia*, 365 U.S. 570, 593-96 (1961).

The Commonwealth of Virginia, contended, however, that Gibson had waived his constitutional privilege against self-incrimination when his attorney sought and obtained an initial order for an examination and evaluation by a private psychiatrist. The Fourth Circuit rejected this contention in part because it concluded that defense counsel had no other choice but to request an examination because of his client's obvious need of psychiatric examination and treatment. The Court noted that counsel would have been subject to censure if he had not done what he did, thus, citing *Simmons*, the court held that the exercise of his client's right to a competency determination to prove that he was insane at the time of the act cannot be conditioned upon a waiver of the client's constitutional privilege against self-incrimination.

The petitioner, Mr. Boruff, and his trial counsel, were in the same position as defense counsel in *Gibson*. Boruff's testimony concerning his ownership of the truck Taylor was driving was inherently suspect because of the unique burden Boruff had to bear in establishing his standing to contest the search. Therefore, without corroboration, the trial court would have certainly been entitled to discredit Boruff's testimony entirely. Thus, in order to effectively assert his client's Fourth Amendment rights and provide Boruff with the effective assistance of counsel to which he was entitled, Boruff's counsel located, interviewed, and called to the witness stand, Ken Howell.

Counsel did not have the luxury of making a strategic decision as to what witnesses to call in his client's defense.

This case is distinguishable from situations where a defendant must choose whether to call witnesses in his defense, *see, e.g., Brown v. Trigg*, 791 F.2d 598 (7th Cir. 1986), because Boruff was required to go forward with evidence establishing his threshold claim of legitimate privacy interests in the truck before the merits of the suppression issue could be addressed as to him. Without Howell, Boruff's uncorroborated testimony as to ownership of the truck was a hollow claim by a person who would benefit greatly from it. Counsel had no choice but to call Mr. Howell.

For the reasons discussed above, Boruff's counsel had no choice, if he was to effectively represent his client, but to develop Mr. Howell's testimony in the eighteen months between Boruff's arrest and the hearing on the issue of standing and call him to corroborate his client's suspect testimony as to his purchase of the truck at issue.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Robert W. Ritchie
Counsel of Record for
Petitioner Boruff
606 W. Main Avenue
Knoxville, TN 37902
(615) 637-0661

APPENDIX

UNITED STATES of America,

Plaintiff-Appellant,

v.

James Othel BORUFF,

Defendant-Appellee.

No. 88-1347.

United States Court of Appeals,
Fifth Circuit

April 21, 1989

Appeal from the United States District Court for the Western District of Texas.

Before RUBIN, JOHNSON, and POLITZ, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

We hold that the government may call to testify at trial a third-party witness called by the defendant at a pretrial suppression hearing whose testimony at that hearing was favorable to the defendant's motion to establish standing and whose identity was not previously known to the government, but whose testimony to the same effect at trial inculpated the defendant.

I.

On July 9, 1985, James Boruff, accompanied by Russell Taylor, purchased a Chevrolet pickup truck from Kenneth Howell, a salesman at Jack Sherman Chevrolet in Midland, Texas. Boruff deposited $2,000 with Howell, and paid the balance with cashier's checks bearing Taylor's name but purchased by Howell. Boruff registered the truck in Taylor's name.

Several days after the purchase, Boruff drove the truck to Knoxville, Tennessee, where he bought a black camper top for the back of the truck, and also installed a grill and bumper guard, fog lights, running lights, and a CB radio. In August, Boruff paid for himself and Taylor to fly to Dallas, Texas, to obtain a driver's license for Taylor and insurance for the truck. From Dallas, Boruff telephoned Howell requesting that he mail to [ ] [Boruff] by Federal Express the truck's permanent license plates in order to expedite the insurance application. Boruff later reimbursed Howell for this expense. Boruff had the truck licensed and insured in Taylor's name.

In November, Taylor was driving the pickup on Highway 385 near Big Bend National Park, sixty miles from the Mexican-American border, when border patrol agents stopped him and searched the truck. Upon finding 591 pounds of marijuana in the truck, the police arrested Taylor and Boruff, who had been driving a white Lincoln Continental Town Car in tandem with the truck. Both men were indicted for possessing more than 50 kilograms of marijuana with intent to distribute[1] and for conspiring to possess marijuana with intent to distribute.[2]

II.

Boruff and Taylor filed pretrial motions to suppress the evidence obtained as a result of the stop of the pickup truck. The district court ruled that the stop and search of the pickup truck was illegal, that the evidence obtained as a result of it was inadmissible, and that it could not, therefore, be used to convict Taylor or Boruff. This court affirmed the district court's decision with regard to Taylor,[3] and the government subsequently dismissed the indictment against him. We held, however, that on the record before us, Boruff lacked standing to challenge the stop of the truck and, therefore, reversed the district

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[1] 21 U.S.C. § 841(a)(1).

[2] 21 U.S.C. § 846.

[3] *United States v. Boruff and Taylor*, 818 F.2d 863 (5th Cir. 1987).

court's suppression order as it pertained to him.

On remand, in response to Boruff's motion seeking to establish his standing to challenge the search of the pickup truck and seizure of the marijuana, the district court held an evidentiary hearing. Boruff testified at the hearing that he had purchased, and therefore owned, the truck that Taylor was driving on November 22. To corroborate this testimony, Boruff called three witnesses, including Ken Howell who testified about the transaction at the Jack Sherman Chevrolet dealership. The district court nonetheless held that Boruff lacked standing to contest the search and seizure.

Prior to jury selection, the government announced its intention to call Howell to testify at trial. Relying on *Simmons v. United States*,[4] Boruff moved to suppress this testimony, claiming that he had presented the witness at the pretrial hearing exclusively to establish his standing to contest the search of the vehicle. Granting Boruff's motion, the district court prohibited the government from calling Howell as a trial witness or using the transcript of his prior testimony. The government contends that *Simmons* bars it only from using the defendant's personal pretrial testimony, not testimony by a third party, and appeals the interlocutory ruling.

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[4] 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

III.

In *Simmons v. United States*, the Supreme Court held

> when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.[5]

As is the case when the government grants use and derivative-use immunity,[6] the government may not use the defendant's testimony either directly as evidence or indirectly as an investigatory lead.[7] Upon objection, the government "has an affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony."[8]

Simmons would, of course, bar the government from calling Howell at trial if it had learned of him solely from Boruff's

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[5] *Simmons*, 88 S.Ct. at 976. *Cf. United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980), *overruling in part, Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960).

[6] 18 U.S.C. § 6002.

[7] *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 1664-65, 32 L.Ed.2d 212 (1972).

[8] *Kastigar*, 92 S.Ct. at 1665.

testimony at the suppression hearing.[9] The question is whether the government may call Howell to testify at trial to repeat *his own* testimony at the suppression hearing when it had learned of his existence only as a result of Boruff having adduced his testimony.

The Supreme Court, in *United States v. Salvucci*,[10] stated that it has "not resolved . . . the proper breadth of the *Simmons* privilege."[11] On various occasions, we have considered whether Simmons bars the government from using at trial a defendant's testimony from other pretrial hearings, such as hearings to suppress an allegedly involuntary confession,[12] to determine competency to stand trial,[13] to establish

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[9] *Simmons*, 88 S.Ct. at 976; *United States v. Butts*, 729 F.2d 1514, 1519 note * (5th CIr.) (en banc), *cert. denied*, 469 U.S. 855, 105 S.Ct. 181, 83 L.Ed.2d 115 (1984); *United States v. Charles*, 738 F.2d 686, 698 (5th Cir. 1984).

[10] 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed. 2d 619 (1980).

[11] *Salvucci*, 100 S.Ct. at 2554.

[12] *United States v. Harrison*, 461 F.2d 1127 (5th Cir.), *cert. denied*, 409 U.S. 884, 93 S.Ct. 174, 34 L.Ed. 2d 140 (1972).

[13] *Pedtrero v. Wainwright*, 590 F.2d 1383 (5th Cir.), *cert. denied*, 444 U.S. 943, 100 S.Ct. 299, 62 L.Ed.2d 310 (1979).

indigency,[14] and to set bail.[15] We have also reviewed whether the government may use the defendant's pretrial testimony for purposes other than to establish guilt, such as impeachment[16] and sentencing.[17] We have never considered, however, whether the protection afforded the defendant under *Simmons* shields from government use the witnesses who testify on his behalf.

Simmons rests on the premise that it is "intolerable" for a defendant to be forced to surrender "one constitutional right"--his Fifth Amendment right against self-incrimination--"in order to assert another"--his Fourth Amendment right not to be subject to unreasonable searches and

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[14] *Davis v. Wainwright*, 342 F.Supp. 39 (M.D. Fla. 1971), *aff'd*, 469 F.2d 1405 (5th Cir. 1972). *Cf. United States v. Kahan*, 415 U.S. 239, 94 S.Ct. 1179, 39 L.Ed.2d 297 (1974).

[15] *United States v. Dohm*, 618 F.2d 1169 (5th Cir. 1980) (en banc); *United States v. Dohm*, 597 F.2d 535 (5th Cir. 1979).

[16] *See Butts*, 729 F.2d at 1519 note *; *United States v. Gomez-Diaz 712 F.2d 949, 951 n. 1 (5th Cir. 1983)*, cert. denied, 464 U.S. 1051, 104 S.Ct. 731, 79 L.Ed.2d 191 (1984). *Cf. Salvucci*, 100 S.Ct. at 2554 n. 8.

[17] *United States v. Hernandez Camacho*, 779 F.2d 227 (5th Cir. 1985), *cert. denied*, 476 U.S. 1119, 106 S.Ct. 1981, 90 L.Ed.2d 664 (1986).

seizures.[18] A defendant's Fifth Amendment right against self-incrimination, however, like other constitutional rights,[19] is "a purely personal right" that cannot be vicariously asserted.[20] Just as the police's violation of Taylor's Fourth Amendment right to be free from unreasonable searches and seizures does not preclude the government from pursuing its indictment against Boruff,[21] so Boruff's Fifth Amendment right against self-incrimination shields only his testimony and those others matters covered by the Fifth Amendment privilege, such as personal documents in his possession.[22] Boruff's Fifth Amendment right against self-incrimination is, therefore, not implicated when other individuals testify against him.

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[18] *Simmons*, 88 S.Ct. at 976. *See* Note, Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings, 76 Col.L.R. 674 (1976).

[19] *See i.e., Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 966-67, 22 L.Ed.2d 176 (1969); *Hampton v. United States*, 425 U.S. 484, 96 S.Ct. 1646, 1650, 48 L.Ed.2d 113 (1976).

[20] *Rakas v. Illinois*, 439 U.S. 128, 99 S.Ct. 421, 428-29 n. 8, 58 L.Ed.2d 387 (1978). *See Bellis v. United States*, 417 U.S. 85, 94 S.Ct. 2179, 2183-84, 40 L.Ed.2d 678 (1974); *Couch v. United States*, 409 U.S. 322, 93 S.Ct. 611, 615-16, 34 L.Ed.2d 548 (1973); *United States v. White*, 322 U.S. 694, 64 S.Ct. 1248, 1251, 88 L.Ed.2d 1542 (1944).

[21] *See Salvucci, supra.*

[22] *Bellis*, 94 S.Ct. at 2184.

That Howell in fact testified at the pretrial hearing, permitting the government to learn both of his existence and his possible testimony, is the evidence that satisfies the government's burden: to prove that Howell's testimony had been "derived from a legitimate source wholly independent of the [defendant's] compelled testimony."[23] While a defendant's decision to call third-parties to corroborate his testimony at a suppression hearing might be affected by his knowledge that the government may subsequently utilize that testimony at trial, "this dilemma . . . does not rise to the level of a constitutional problem."[24] Boruff was never forced to, nor did he, surrender his constitutional rights: he exercised his Fourth Amendment right to challenge an allegedly unreasonable search and seizure, and the government did not seek to use his own testimony or any evidence developed as a result of his own testimony to incriminate him at trial.

As Justice Holmes observed, a "party is privileged from [himself] producing the [incriminating] evidence, but not from its production [by others]."[25] The Fifth Amendment protects the party who seeks to avoid self-incrimination. It does not

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[23] *Kastigar*, 92 S.Ct. at 1665.

[24] *Brown v. Trigg*, 791 F.2d 598, 602 (7th Cir. 1986). *See United States v. Ceccolini*, 435 U.S. 268, 98 S.Ct. 1054, 1060-61, 55 L.Ed.2d 268 (1978).

[25] *Johnson v. United States*, 228 U.S. 457, 33 S.Ct. 572, 57 L.Ed. 919 (1913).

protect the testimony of individuals who are not incriminating themselves and who have only supported another individual's invocation of his Fourth Amendment rights.

For the foregoing reasons, the judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with this opinion.

UNITED STATES of America,
Plaintiff-Appellant

v.

James Othel BORUFF,
Defendant-Appellee.

No. 88-1347.

United States Court of Appeals,
Fifth Circuit.

June 8, 1989.

Appeal from the United States District Court for the Western District of Texas.

ON PETITION FOR REHEARING

(Opinion April 21, 1989, 5th Cir., 1989, 870 F.2d 316)

Before RUBIN, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

In his petition for rehearing, Boruff reasserts the claims, made in his original brief and not addressed by the court in its original opinion, that the government's use of Howell's testimony violated Boruff's sixth amendment right to

effective assistance of counsel and his fifth amendment right to due process.

Counsel's decision to call a witness to testify at a suppression hearing, knowing that the government may thereby learn of his existence and call him to testify at trial, is a matter of trial strategy, and does not render his assistance ineffective.[1] Nor is the defendant's due process right to a fair trial violated when the government calls this witness to testify at trial. The requirement that the government establish its case by presenting evidence "independently secured through skillful investigation"[2] ensures that the government "prov[e] its charge against the accused not out of his own mouth,"[3] a claim we have already considered.

The petition for rehearing is, therefore, DENIED.

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[1] *See, Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[2] *Watts v. Indiana*, 338 U.S. 49, 54, 69 S.Ct. 1347, 1350, 93 L.Ed.1801 (1949).

[3] *Id.* at 54, 69 S.Ct. at 1350.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-1175

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

JAMES OTHEL BORUFF and
RUSSELL BOYD TAYLOR,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas
(P 85 CR 73)

(April 27, 1987)

Before BROWN, REAVLEY and JOLLY, Circuit Judges. E. GRADY JOLLY, Circuit Judge:[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the

The government appeals from the district court's order suppressing evidence against the defendants James Boruff and Russell Taylor. Because we agree with the district court's finding that the border patrol agent's stop of Taylor's vehicle was illegal, we affirm the district court's ruling that evidence obtained as a result of this stop may not be used against Taylor. Since we find, however, that Boruff lacked standing to challenge the stop of Taylor's vehicle, we reverse the district court's suppression order as it pertains to Boruff.

I

Shortly after noon on Thursday, November 21, 1985, U.S. Border Patrol Agent Donald Newberry observed a white Lincoln Continental, followed by a grey and black pickup truck with a camper cap, heading south on Highway 385 toward the Big Bend National Park. No other traffic was close to the two vehicles, which were travelling within the speed limit and were then approximately eleven miles south of Marathon, Texas. Both bore Texas license plates, although Newberry did not recognize the two unaccompanied drivers as "locals." Because the national park attracts a large number of tourists annually, it was not unusual for Newberry to see such vehicles on Highway 385, one of two main entrance roads to the park. Newberry noted the vehicles, however, because, being driven in tandem with only the driver in each, they fit a "smuggler pattern" in which one vehicle is

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legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

dropped off over the Mexican border so that it can be returned carrying contraband or aliens, and he knew that much illegal activity occurs on Highway 385. He also noted that the Lincoln carried a magnetic CB antenna on its roof and that he had an unobstructed view through the pickup camper's windows.

Just after 9 a.m. the next day, Newberry and his partner noticed the same two vehicles, separated by a tour bus, heading northbound on Highway 385, approximately thirty miles south of Marathon. The driver of the Lincoln "pick[ed] up something and put it to his mouth as though it was a microphone" while looking at Newberry. Newberry and his partner turned to follow the vehicles north. The Lincoln, however, apparently had also turned and passed them heading southbound. Because he had seen the vehicles heading into the park only the afternoon before, Newberry concluded that there had been too short a time for the drivers to have been camping there, and he radioed another agent, Harris Clanton, to intercept the Lincoln while he pursued the pickup truck.

As Newberry closed in on the truck, he observed that camping equipment was visible through the camper windows. Suspecting that a false compartment concealing aliens or contraband might be propping up the equipment, he signalled the driver of the pickup, Taylor, to pull over. The stop took place sixty road miles from the Mexican border. Taylor told Newberry that he had been camping and rafting in the park during the previous four days. To Newberry, this conflicted with his observation of Taylor's being on the highway

the day before, but he conceded on cross-examination that it was possible for a camper to have made a day trip that could cover the stretch of highway on which he had originally observed Taylor.

Taylor consented to Newberry's request to look inside the camper, and opened the truck's tailgate and camper top for the agents. At that point, Newberry was called back to his vehicle to answer a radio message from Clanton who informed him that the Lincoln had again turned around and was then heading north toward Newberry. Newberry returned to the pickup and Taylor reopened the camper when he returned. Camping equipment was resting on top of a large mound covered by a blue tarpaulin, and Newberry noticed a strong cherry scent not common to campers. Toward the rear of the truck bed were gas cans behind which large bundles of marijuana wrapped in clear plastic were visible. The agents ultimately seized from the truck twenty-seven bundles of marijuana weighing 591 pounds.

Newberry placed Taylor under arrest. A few seconds later, the Lincoln approached and Newberry motioned the driver, Boruff, to stop. Newberry recognized Boruff as the same person he had seen the day before driving in tandem with the pickup, and noticed a little earlier driving ahead of the tour bus. Newberry noticed that the CB antenna was no longer on top of the Lincoln but was in plain view on the back seat of the car. Convinced that Boruff was travelling with Taylor, Newberry placed Boruff under arrest.

II.

Taylor and Boruff were indicted for possession of marijuana with intent to distribute and for conspiracy to possess marijuana with intent to distribute. Both defendants filed pretrial motions to suppress the evidence obtained as a result of the stop of Taylor's pickup truck. The district court ruled that the stop was illegal and that the evidence obtained as a result of the stop was inadmissible at trial. The government filed a motion for reconsideration, which was denied. This appeal followed.

III.

At issue in this case is the legality of the investigatory stop made on the pickup truck driven by Taylor.

Stops of vehicles by law enforcement authorities are governed by the Fourth Amendment which prohibits unreasonable searches and seizures. Generally, the Fourth Amendment requires that searches or seizures be conducted in accordance with a warrant supported by probable cause. Searches and seizures made at or near the border, however, for largely historical reasons need not conform to the warrant and probable-cause requirements. In particular, the Supreme Court has held that roving border patrols may stop vehicles near the boarder if the detaining officers have a reasonable suspicion that individuals stopped were violating federal law. *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

Reasonable suspicion for making an investigatory stop near the border exists if there are "specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion: that the stopped vehicle contained illegal cargo. *Cortez*, 449 U.S. at 416 (quoting *Brignoni-Ponce*, 422 U.S. at 884); *United States v. Henke*, 775 F.2d 641, 643 (5th Cir. 1985). (Although this standard was originated in the context of smuggling illegal aliens, neither party disputes its applicability to the smuggling of drugs over the border.) The determination of reasonable suspicion must be made on the totality of the circumstances, *Henke*, 775 F.2d at 643,[2] and the officer making the stop is "entitled to assess the facts in the light of his experience in detecting illegal entry and smuggling." *Id.* at 885; *United States v. Pallares-Pallares*, 784 F.2d 1231, 1233 (5th Cir. 1986).

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[2] The courts have mentioned a number of factors to be considered (although no single one is controlling):

(1) characteristics of the area in which the vehicle is encountered; (2) proximity to the border: (3) usual patterns of traffic on the particular road; (4) previous experience with alien traffic; (5) information about recent illegal crossing in the area; (6) behavior of the driver, as erratic driving or obvious attempts to evade officers; (7) appearance and aspects of the vehicle; and (8) number, appearance, and behavior of passengers.

Brignoni-Ponce. 422 U.S. at 884-85.

The district court concluded that the stop of Taylor's vehicle was not supported by reasonable suspicion because there was a paucity of objective, articulable facts to support such a finding. Speaking as an appellate court which reviews the cold records, we cannot say that the district court, familiar with the area where the stop took place and having had the benefit of hearing the witnesses first hand, erred in its determination that reasonable suspicion was lacking.[3]

The district court found that the border patrol agents had only a slim basis for reasonable suspicion based on objective, articulable facts: the same vehicles were travelling in tandem on two consecutive days, camping equipment not observed the previous day was seen piled high in the rear of the truck driven by Taylor, and the Lincoln apparently made a quick U-turn on the second day that the two vehicles were observed. These facts, while perhaps

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[3] Although particular findings of fact by a district court in suppression proceedings are subject to the "clearly erroneous" standard, a district court's ultimate finding as to whether the facts give rise to reasonable suspicion has been subject to different standards of review in this circuit. In some cases, the court has applied the "clearly erroneous" standard to the district court's determination of reasonable suspicion. *See Henke*, 775 F.2d at 664 n. 6, while in other cases, the court has exercised an independent review. *Id.* We need not decide which standard to apply here since our conclusion would be the same regardless of the standard applied.

somewhat unusual, were certainly not, in the view of the district court, highly suspicious. Moreover, the district court found that the behavior of the defendants upon being observed by border patrol agents, as well as the appearance of the vehicles could only be characterized as normal. In short, the district court concluded that the observations upon which Agent Newberry based his stop were readily consistent with innocent activity. We find no compelling reason to conclude otherwise.

IV

The district court determined that the evidence obtained as a result of the invalid stop of Taylor's vehicle could not be used against either defendant. Evidence may not be excluded against a defendant under the Fourth Amendment, however, unless it is established by the defendant that the unlawful search or seizure violated his own constitutional rights. *United States v. Payner*, 447 U.S. 727, 731 (1980) (emphasis added). A defendant's Fourth Amendment rights are violated only when the challenged conduct invades his legitimate expectation of privacy rather than that of a third party. *Id.* Contrary to the district court's ruling, Boruff lacking standing to challenge the stop and search of Taylor's vehicle because the stop did not violate Boruff's own Fourth Amendment rights. Hence, the evidence obtained as a result of the stop of Taylor's vehicle is properly admissible against Boruff.

Boruff produced no evidence to establish that the stop of Taylor's truck violated Boruff's Fourth Amendment rights. Taylor was the driver, sole occupant and

registered owner of the pickup truck where the marijuana was found; Boruff had neither a proprietary nor a possessory interest in Taylor's truck. Furthermore, the fact that Boruff claims a possessory interest in the marijuana found in Taylor's truck does not give him standing to contest the stop of the truck, since the ownership of drugs found in another's property does not create the legitimate expectation of privacy necessary to support a Fourth Amendment claim. *Rawlings v. Kentucky*, 448 U.S. 98, 105-06 (1980).

V

Boruff argues that the government waived its right to challenge his standing to contest the stop of Taylor's truck. We disagree. Prior to the district court's ruling on the defendants' suppression motion, the government filed a supplemental challenge to Boruff's standing to contest the search of Taylor's truck. The district court apparently considered this contention because it stated in its memorandum order granting the motion to suppress: "[T]he court has considered the government's objection to the defendants' standing to raise complaints about the alleged illegal stop and finds same to be without merit." Hence, contrary to the assertions of Boruff, the government's objection to his standing was raised before, and considered by, the district court. The cases cited by Boruff in support of his argument[4] are readily

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[4] Boruff cites *Steagald v. United States*, 451 U.S. 204 (1981); *United States v. Settegast*, 755 F.2d 1117 (5th Cir. 1985); *United States v. Mendoza*, 722 F.2d 96 (5th

distinguishable, since, unlike this case, they involved instances where the government raised the standing issue for the first time on appeal.

VI

For the reasons discussed earlier, the district court's suppression order is affirmed with respect to Taylor but reversed with respect to Boruff. The case is remanded for further proceedings not inconsistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Cir. 1983); and *United States v. Sanchez*, 689 F.2d 508 (5th Cir. 1982).

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
PECOS DIVISION

UNITED STATES OF AMERICA	)	
	)	
V.	)	P-87-CR-73
	)	
JAMES OTHEL BORUFF	)	

ORDER

BEFORE THIS COURT on November 10, 1987 came the parties for hearing on the Motion of Defendant for rehearing on the issue of standing of Defendant to assert a Fourth Amendment right against unreasonable search and seizure. By Memorandum Opinion issued subsequent to that hearing, this Court found that Defendant did not have standing to assert the Fourth Amendment issue as to certain seized contraband.

On November 10, 1988, Plaintiff requested a clarification on the issue of whether the United States would be allowed to call as witness Kenneth Wayne Howell who testified on August 5, 1987 in support of Plaintiff's efforts to establish standing. At that time, this Court allowed the testimony of Howell only for the limited purpose of the Motion to Suppress. *United States v. Simmons*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). This Court expressly limited the purposes of the testimony and the United States will not be permitted to use the transcript of that hearing or call witness Kenneth Wayne Howell in the trial on the merits.

SIGNED AND ENTERED, this, the 21st day of April, 1988.

Lucius D. Bunton
United States District Court

AMENDMENT IV

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, or be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Supreme Court, U.S.
FILED
AUG 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-262

In the Supreme Court of the United States

OCTOBER TERM, 1989

JAMES OTHEL BORUFF, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing a district court order suppressing evidence.

1. On December 13, 1985, petitioner was indicted by a federal grand jury sitting in the Western District of Texas. The indictment charged petitioner with conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846, and possession of marijuna with intent to distribute it, in violation of 21 U.S.C. 841(a)(1).

Before trial, petitioner moved to suppress evidence obtained as the result of a stop of a pickup truck. Petitioner called Kenneth Wayne Howell as a witness to help establish his standing to challenge the search of the truck. The district court nonetheless held that petitioner lacked standing. After the government announced its intention to call Howell to testify at trial, petitioner moved to suppress

his testimony on the ground that *United States* v. *Simmons*, 390 U.S. 377 (1968), barred the government from calling Howell as a witness. On April 21, 1988, the district court agreed and ruled that the government may not use Howell as a witness because he was not known to the government before he was called by petitioner at the suppression hearing. Pet. App. 23a-24a.

The court of appeals reversed. Pet. App. 1a-10a. The court held that the *Simmons* case does not bar the government from calling as a trial witness a third party who was called by the defendant to testify at a suppression hearing. The court noted that *Simmons* rests on the premise that defendant may not be forced to surrender his Fifth Amendment privilege against compulsory self-incrimination in order to assert his Fourth Amendment right against unreasonable searches and seizures. The court concluded, however, that petitioner's privilege against compulsory self-incrimination was not implicated in this case, because the Fifth Amendment does not protect a defendant from the testimony of other individuals.

2. Petitioner contends (Pet. 8-30) that under the rationale of *Simmons*, the government may not call at trial a witness who was originally called by a criminal defendant at a pretrial suppression hearing, if the identity of the witness was not previously known to the government. Whatever the merits of petitioner's contention, it is not presently ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress the testimony of the witness. If petitioner is acquitted following a trial on the merits, his current contention will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his current contention, together with any other claims he may have, in a peti-

tion for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

KENNETH W. STARR
Solicitor General

AUGUST 1989

* Because this case is in an interlocutory posture, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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